

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, NW, Suite 9500
Washington DC, 20001-2021
Telephone: (202) 434-9958
Fax: (202) 434-9949

August 17, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-311-M
Petitioner	:	A. C. No. 48-01497-06604 A
v.	:	
	:	General Chemical Mill
DEWAYNE HERREN,	:	
Respondent.	:	

ORDER DENYING REQUEST TO REOPEN
ORDER TO PAY

_____ This case is before me pursuant to an order of the Commission dated October 6, 2004, remanding this matter for further consideration and determination as to whether the miner, DeWayne Herren, is entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure.¹ In particular, Rule 60(b)(1) provides relief from a final judgment in cases where there has been a “mistake, inadvertence, surprise, or excusable neglect.” Fed.R.Civ.P. 60(b)(1).

This matter arose because Herren failed to notify the Secretary of Labor (“Secretary”) that he wished to contest the proposed penalty assessed to him for an alleged violation of Section 110(c) of the Mine Act within 30 days of receipt of the proposed penalty assessment. In his request for relief, Herren claims he did not defend against the proposed penalty because of inadvertence or mistake. He contends he was informed by an MSHA investigator that he would need to be interviewed prior to any hearing taking place. However, Herren did not give an interview, believing “the whole thing would then go away.” Resp. Affidavit at 2. The Secretary filed a response to Herren’s request to reopen, arguing that Herren seems to have deliberately avoided an interview with MSHA, which, if true, undermines Rule 60(b). Sec. Mot. at 2. The Secretary also requested “that the Commission remand the case to an administrative law judge with instructions to provide both parties with an opportunity to present relevant evidence and legal arguments.” Sec. Mot. at 2-3.

Upon review of the record and the Secretary’s request, on March 24, 2005, I issued an order to the Secretary to submit a statement indicating the type of additional information she was seeking from Herren and the type information she intended to submit. Accordingly, the Secretary filed a response, requesting that Herren’s request be denied, claiming MSHA employees made

¹While the Commission is not obligated to adhere to the Federal Rules of Civil Procedure, the Commission has found guidance and has applied “so far as practicable” Rule 60(b). 29 C.F.R. § 2700.1(b).

several attempts to contact Herren, either by telephone, in person, or by letter, to no avail. Sec. Reply Apr. 18 Brief at 3-4. Moreover, in a sworn affidavit, the investigator claims he never told Herren that a civil penalty hearing could be avoided by Herren's refusal to be interviewed by an MSHA official. Thomas Marvke Affidavit at 2. The Secretary argues that Herren's deliberate refusal to respond to the proposed penalty assessment is not grounds for Rule 60(b) relief. Sec. Reply Apr. 18 Brief at 2-3.

In response, Herren, through counsel, contends he "did not understand the consequences of his actions, but rather this was his way of defending himself when he knew that he was not at fault in the subject accident." Resp. Apr. 29 Brief at 2. Herren argues that "defaults are not favored," and that "when . . . the defending party, *for whatever reason*, and in particular through inadvertence or mistake, fails to defend himself and yet maintains that he has a good defense to the allegations, then justice requires that the defendant be allowed to present his defense." *Id.* (emphasis added).

Based upon the arguments presented, I deny Herren's request to reopen the penalty assessment. While Herren accurately argues that defaults are not favored, he is wholly inaccurate in stating that if "*for whatever reason*" he "fails to defend himself and yet maintains that he has a good defense . . . then justice requires that [he] be allowed to present his defense." Justice does not require an adjudicative body to ignore or excuse a litigant's conscious decision to circumvent the judicial process.

Herren admits avoiding MSHA officials for the purpose of making his case "go away." I do not believe the MSHA investigator suggested to Herren in any way that dodging the interview would be a strategy for averting payment or a hearing. Further, I am not convinced that Herren did not understand the consequences of his actions. But even if he did not, a party's blatant disregard for Commission procedure does not warrant Rule 60(b) relief. Herren was provided an opportunity to question the evidence presented against him, to present his own defense, and to have the matter heard before an impartial adjudicator. Mr. Herren chose at his peril to forego this process.

For the foregoing reasons, Herren's request to reopen the penalty assessment is **DENIED**. Herren is **ORDERED TO PAY** the proposed penalty assessment.

Robert J. Lesnick
Chief Administrative Law Judge

Distribution: (Certified Mail)

W. Christian Schumann, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Boulevard, 22nd Floor, Arlington, VA 22209-2296

Frank D. Neville, Esq., Williams, Porter, Day & Neville, P.C., 159 North Wolcott, Suite 400, P.O. Box 10700, Casper, WY 82602

/mvc